1985

Ronald Cunningham v. University of Utah Medical Center : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

RONALD CUNNINGHAM,

Plaintiff/Appellant,

v. Case No. 20638

UNIVERSITY OF UTAH MEDICAL CENTER,

Defendant/Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

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BRIEF OF RESPONDENT

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Can appellant show, solely upon the record before this Court, that the lower court erred in granting respondent's Motion to Dismiss?

STATEMENT OF THE CASE

Nature of the Case

This is an action for alleged medical malpractice arising from the performance of a surgical procedure upon plaintiff Ronald Cunningham by Dr. Michael H. Stevens at the University of Utah Hospital on January 28, 1982. Plaintiff claims that Dr. Stevens was negligent in his medical treatment of plaintiff, that his negligence caused injury to plaintiff, and that

defendant University of Utah (incorrectly identified as University of Utah Medical Center) is vicariously liable for plaintiff's damages on agency principles because of its employer-employee relationship with Dr. Stevens at the time of the surgery.

Defendant filed a Motion to Dismiss in the lower court on the ground that plaintiff's claim against the University had already been adjudicated in a separate action filed by plaintiff in the same court against Dr. Stevens in his individual capacity. The lower court, the Honorable Philip R. Fishler presiding, granted defendant's motion. This appeal followed.

Statement of Facts

Plaintiff Ronald Cunningham underwent surgery at the University of Utah Hospital on January 28, 1982, following several weeks of observation, treatment and testing. [R. 3-4.] Cunningham's treating physician and surgeon was Dr. Michael H. Stevens. [R. 4.] At all times relevant to plaintiff's allegations in this action, Dr. Stevens was an employee of the University of Utah through its Hospital and School of Medicine. [R. 2.] Plaintiff claims he did not know of Dr. Stevens' employment relationship with the University until February 5, 1984. [R. 3, 5-6.]

Plaintiff filed this action on January 18, 1985. [R. 2.] Plaintiff's claims against the University are based solely on

its status as Dr. Steven's employer; plaintiff does not allege any independent acts of negligence on the part of the University. [Brief of Appellant, p. 6.]

The University filed a Motion to Dismiss in response to plaintiff's Complaint. [R. 10-11.] The motion was based on, inter alia, the ground that plaintiff's claims against the University had previously been adjudicated by the lower court in a separate action filed against Dr. Stevens in his individual capacity, Third District Court Civil No. C84-286. [R. 10.] Oral arguments on defendant's motion were heard before Judge Fishler on January 22, 1985, pursuant to notice. [R. 13, 21.]

Judge Fishler granted defendant's motion on the basis of the court's ruling in the prior action. [R. 22.] The Order of Dismissal was entered by the court on March 7, 1985. [R. 22.] No objection was made to the order. Plaintiff's Notice of Appeal was filed on April 5, 1985. [R. 25-26.]

SUMMARY OF ARGUMENTS

An appellant has the affirmative burden to show, solely upon the record before the appellate court, that the lower court erred with respect to the order in question. The plaintiff in this case is unable to make such a showing, and the order of the lower court must therefore be presumed to be correct and valid.

The lower court's order should be affirmed, even if the Court chooses to consider plaintiff's arguments based on the matters presented by plaintiff which are outside the appellate record. Judge Fishler's order gives appropriate deference to a prior order of the lower court denying plaintiff leave to amend his Complaint to state his claim against this defendant. The attempted amendment was futile because plaintiff's claim is barred by his failure to file a timely notice of claim as required by the provisions of the Utah Governmental Immunity Act.

ARGUMENT

POINT I

PLAINTIFF HAS FAILED TO CARRY HIS BURDEN OF SHOWING UPON THE RECORD ON APPEAL THAT THE LOWER COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS.

An appellant has the affirmative burden of showing, upon the record on appeal, that the lower court erred with respect to the order or judgment from which the appeal is taken. Holman v. Sorenson, 556 P.2d 499, 500 (Utah 1976); accord Hamid v. Sew Original, 645 P.2d 496, 497 (Okla. 1982) [Legal error is not presumed from a silent record]. Under Utah law, the judgment of the lower court is presumed correct until this affirmative burden has been met. Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410, 412-13 (1964).

The required demonstration of error must be made solely upon the appellate record. This Court has consistently followed the well-recognized rule of appellate review that matters not a part of the record on appeal need not, and indeed cannot, be considered in connection with the appeal. Uckerman v. Lincoln National Life Insurance Co., 588 P.2d 142, 144 (Utah 1978); In re Estate of Cluff, 587 P.2d 128, n. 1 (Utah 1978). This rule was recently reaffirmed by this Court's opinion in Robinson & Wells, P.C. v. Warren, 669 P.2d 844 (Utah 1983). Justice Oaks, for a unanimous court, wrote:

> Plaintiff does not contest these propositions, but maintains that the reasonableness of its fees is not before us on this appeal. In arguing this point, both parties encumber their briefs with assertions of facts about what went on in the hearing before the arbitrator for which there is no reference to the record and no support in the record. We ignore all such matters and base our decision solely upon the facts shown in the record.

669 P.2d at 846.

Utah law charges the appellant with the responsibility and burden of bringing before the reviewing court a record upon which the merit of his position can be ascertained. Bennett Leasing Company v. Ellison, 15 Utah 2d 72, 387 P.2d 246 (1963). In the absence of an appellate record sufficient to document the alleged trial court error, the judgment of the lower court is presumed valid and must be sustained. Where only a partial record is presented to the reviewing court, it

is presumed that the remaining record below supports the judgment of the trial court. Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410, 413 (1964); Bennett Leasing Company v. Ellison, supra at 247.

In Richards v. Anderson, 9 Utah 2d 17, 337 P.2d 59 (1959), this Court affirmed the trial court's summary judgment dismissing the plaintiff's claim for damages arising from an intersection collision. The Court wrote:

> When a summary judgment is granted against a party, he is entitled to have the trial court, and this court on review, consider all of the evidence and every inference fairly to be derived therefrom in the light most favorable to him. This rule, relied upon by the plaintiff, is not very helpful here because the only facts before us are contained in the above-mentioned documents and the recitals in the judgment signed by the trial court based upon the pretrial conference. In the absence of any other record it stands unassailed as reflecting the facts presented to the court. If the plaintiff contends to the contrary, he has the burden of bringing the record here to show otherwise, because the burden is upon the appellant to show error.

337 P.2d at 60 [footnotes omitted].

The order of the lower court in this case must be affirmed on appeal since plaintiff is unable to substantiate his claim of error upon the appellate record before this Court.[1]

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[1] Plaintiff makes one argument for reversal upon the appellate record, claiming error in the form of the lower court's order. Plaintiff argues the order is in fact a summary judgment since the court took judicial notice of matters outside the pleadings, viz. Judge David B. Dee's order denying plaintiff leave to amend in his prior action against Dr. Stevens. (Continued)

Plaintiff encumbers his brief with statements and arguments not supported by the record concerning what occurred in his other action against Dr. Stevens, and also attempts to bring before this Court, through inclusion in the appendix of his brief, documents which are not a part of the record on appeal. These matters cannot be considered by the Court in deciding this appeal, in keeping with the authorities cited above and the current Rules of Appellate Procedure. See URAP, Rule 10(h) [record may only be corrected, modified or supplemented by stipulation of parties, order of district court or order of supreme court]. Plaintiff cannot establish on the basis of the appellate record that Judge Fishler's order was not properly based on res judicata or that he should have reconsidered the merits of plaintiff's claims. [Brief of Appellant, Statement

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[1] (Continued)

This argument is without merit. The trial court may take judicial notice of its ruling in other prior or pending cases, so long as the parties are made aware it is doing so. Carter v. Carter, 563 P.2d 177, 178 (Utah 1977). The parties in this case do not dispute that the prior order was called to Judge Fishler's attention. Whether the dismissal based on that prior ruling was styled an order or judgment is of no effect; it is the substance of the document not its title which controls. Cf. Dunham v. Travis, 25 Utah 65, 69 P. 468 (1902) [it is facts set up in pleading, and not name given to it, which determines whether it is answer or counterclaim]. Most importantly, plaintiff has waived any argument over any irregularity in the form of the order by failing to make a timely objection before the lower court.

of Issues, p. 1.] The order of the lower court is therefore presumed correct and valid and should be affirmed.

One prior decision of this Court is similar enough to the primary issue posed in this appeal and its attendant factual setting that counsel feels an ethical obligation to bring it to the Court's attention, even though the majority opinion is inconsistent with the authorities discussed above and contrary to defendant's position.

In Parrish v. Layton City Corporation, 542 P.2d 1086 (Utah 1975), the Court reviewed a summary judgment granted defendant by the lower court on the ground that plaintiff was barred from recovery by the res judicata effect of a dismissal of a prior claim he had filed in the same court, and by his continuing failure to comply with the notice of claim provisions of the Utah Governmental Immunity Act. 542 P.2d at 1087.

The opinion states:

> A survey of the record reveals that defendant never submitted a copy of the pleadings and judgment in Civil No.17649 to the trial court, either in its pleadings or in company with its motion for summary judgment. The mere fact that there was a record of another action on file in the clerk's office did not place these records in evidence. Rule 68(1) and (3) U.R.E., and Rule 44(a) and (d) U.R.C.P., provide the methods by which a judicial record may be proved. Since the record of the prior action was not before the trial court, there is no basis to sustain the determination that plaintiff's claim was barred by the doctrine of res judicata.

542 P.2d at 1087 [footnotes omitted].

The Parrish Court's analysis is inconsistent with the other decisions of this Court discussed above upholding the principle that the appellant must demonstrate on the basis of the appellate record that the lower court erred; the burden is not upon the respondent to prove the lower court acted correctly, rather that is presumed.

The dissenting opinion in Parrish, authored by Justice Ellett and concurred in by Justice Crockett, is consistent with this Court's other pronouncements and states the better rule:

> I dissent from the holding that the trial court could not find res judicata. The main opinion says, "A survey of the record reveals that defendant never submitted a copy of the pleadings and judgment in Civil No. 17649 to the trial court."
>
> The true statement should be that the record does not show that the files in Civil No. 17649 were not before the trial court. There is no transcript before us, and it is mere speculation to say that counsel did not hand file No. 17649 to the judge and say, "Will Your Honor take judicial notice of papers in this file?"
>
> We presume the judge acted properly and based his ruling on credible evidence. One who attacks the judgment of the Trial Court has the burden of showing error, and when the transcript of a proceeding in court is not brought before us, we cannot speculate that perhaps there was no proper evidence to sustain the ruling made.

542 P.2d at 1089 [footnote omitted].

POINT II

THIS APPEAL IS AN ATTEMPT BY PLAINTIFF TO CIRCUMVENT THE PRIOR RULINGS OF BOTH THIS COURT AND THE LOWER COURT. THE LOWER COURT'S ORDER SHOULD BE AFFIRMED SINCE IT GAVE PROPER DEFERENCE TO A PRIOR CORRECT RULING OF THE SAME COURT.

This appeal, like the filing of this action in the lower court, is an overt attempt by plaintiff to circumvent the effect of Judge David B. Dee's prior order denying plaintiff's Motion to Amend his complaint in the prior action against Dr. Stevens.[2] This defendant does not approve of plaintiff's attempt to seek a review of Judge Dee's order by introducing matters for this Court's consideration which are beyond the appellate record. Should the Court choose to address plaintiff's arguments, however, and thereby review both Judge Fishler's order and Judge Dee's prior order, the following argument is offered.

A. Supporting Facts.

Plaintiff's allegations in this action are identical to the allegations he sought to assert against the University of Utah by way of amendment in his prior action against Dr. Stevens. Plaintiff does not allege he was injured by any independent act

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[2] This Court has previously denied plaintiff's petition for an intermediate appeal of Judge Dee's order. Ronald Cunningham v. Michael H. Stevens, M.D., Supreme Court No. 20443 (March 20, 1985).

of negligence on the part of the University. He claims only that the University is vicariously liable to him for the negligence of its employee, Dr. Michael H. Stevens ("Dr. Stevens").

At all times relevant to plaintiff's allegations, Dr. Stevens was an employee of the University of Utah School of Medicine. He officed at the University of Utah and limited his practice to the University of Utah School of Medicine and Hospital. The care and treatment Dr. Stevens rendered to plaintiff was performed in his capacity as an employee of the University of Utah. Addendum, pp. 1-4.

Plaintiff became aware of the facts giving rise to his claim against Dr. Stevens soon after the January 28, 1982, surgery. Addendum, pp. 5-6. Plaintiff served Dr. Stevens with a Notice of Intent to Commence Legal Action on June 9, 1983, in care of the University of Utah Hospital. Addendum, p. 7. The Notice of Intent was later amended by supplemental notices.

Plaintiff commenced an action against Dr. Stevens in the Third Judicial District Court of Salt Lake County, Civil No. C84-286, on January 19, 1984. Counsel for Dr. Stevens filed a Motion to Dismiss on the basis that Dr. Stevens was at all times an employee of the University of Utah and was therefore entitled to the protection of the provisions of the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1 et seq. (1977). On the basis of that motion, plaintiff filed an

Amended Complaint in March 1984, changing his claim against Dr. Stevens from an allegation of ordinary negligence to an allegation of gross negligence in an effort to comply with the provisions of the Utah Governmental Immunity Act. Plaintiff then served the State Attorney General's Office with a Notice of Intent to Commence Legal Action against the University of Utah Medical Center on March 7, 1984. An Amended Notice of Intent dated July 30, 1984, was served on the Attorney General's Office on August 2, 1984, and on the University of Utah Hospital on August 6, 1984.

In November 1984, plaintiff again moved to amend his Complaint against Dr. Stevens to join the University of Utah Medical Center as a defendant. Plaintiff's proposed amendment stated the identical claim asserted in this action. Addendum, pp. 8-20. Plaintiff's motion was briefed, and then argued before Judge David B. Dee on December 14, 1984. Counsel for the University of Utah and Dr. Stevens indicated to the Court that they had no procedural objection to plaintiff amending his Complaint, but that the University would thereafter file a Motion to Dismiss based on plaintiff's failure to comply with the notice of claim requirement of the Utah Governmental Immunity Act. In the interest of judicial economy, Judge Dee heard argument on the University's defense. After taking the matter under advisement Judge Dee denied plaintiff's Motion to

Amend on the basis that the amendment was futile since the claims plaintiff sought to assert were barred by his failure to serve a timely notice of claim as required by the Utah Governmental Immunity Act. Addendum, pp. 21-22.

Following the entry of Judge Dee's order, plaintiff filed this action in an overt attempt to circumvent the effect of Judge Dee's ruling by having the "new case" heard by a different judge. The case was assigned to Judge Fishler, who saw through plaintiff's ruse and dismissed the "new case" on the basis of Judge Dee's prior ruling. Judge Fishler did not attempt to address the merits of plaintiff's claims or defendant's notice of claim defense since Judge Dee had already done so.

B. Res Judicata.

Judge Dee's ruling was a final determination on the merits as to all issues pertaining to plaintiff's claim against this defendant. It is a final judgment as to this defendant, even though the order is interlocutory in nature because of the remaining claim against Dr. Stevens. It therefore falls within the spirit of the principle of res judicata and Judge Fishler's order to that effect is a correct ruling. See Searle Bros. v. Searle, 588 P.2d 689, 690 (Utah 1978) [res judicata precludes relitigation of same cause of action between same parties].

The lower court's order should be affirmed whether or not this Court finds that the situation presented fits the technical requirements for application of res judicata. Under the rules of appellate review, this Court will affirm the trial court on any proper ground even if the trial court assigned an incorrect reason for its ruling. Allphin Realty, Inc. v. Sine, 595 P.2d 860, 861 (Utah 1979). Judge Fishler's order should be affirmed since it accorded proper deference to the prior ruling of Judge Dee.[3] Judge Dee properly denied plaintiff's Motion to Amend finding that the claim plaintiff wished to assert was subject to dismissal because of plaintiff's failure to comply with the notice of claim provision of the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-12, and the amendment was therefore futile.

C. Futility of Amendment.

Rule 15(a) of the Utah Rules of Civil Procedure, and cases decided thereunder, do state, as plaintiff argues, that leave to amend shall be freely given in the interest of justice. The trial court is granted wide discretion in determining whether amendment should be allowed. Gillman v. Hansen, 26 Utah 2d

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[3] Repeated application for an order or the same relief is statutorily prohibited, Utah Code Ann. § 78-7-19 (1977), and may under some circumstances even constitute a contempt of court. Hammer v. Gibbons and Reed Company, 29 Utah 2d 415, 510 P.2d 1104, 1005 (1973).

165, 486 P.2d 1045, 1046 (1971) [cited in Brief of Appellant at p. 8]. The requirement that leave to amend be freely given is not applicable, however, when the complaint, as amended, is subject to dismissal. Mountain View Pharmacy v. Abbott Laboratories, 630 F.2d 1383, 1389 (10th Cir. 1980) (citing Foman v. Davis, 371 U.S. 178 (1962) [while Rule 15(a) requires that leave to amend be freely given, this requirement is not applicable when the Complaint, as amended, would be subject to dismissal]).

A similar situation was presented to the United States Court of Appeals for the Second Circuit in Evans v. United States Veterans Admin. Hospital, 391 F.2d 261 (2d Cir. 1968). In that case the plaintiff filed a negligence action against the Veteran's Administration Hospital. Plaintiff later sought to add the United States as a party under the provisions of the Federal Tort Claims Act. The Court of Appeals affirmed the dismissal of the lower court as to the hospital and further stated:

> Furthermore, plaintiff is foreclosed from amending her complaint to add the United States as a party and thereafter proceeding under the Federal Tort Claims Act, since the two year period of limitations under the federal statute has already run. 28 U.S.C. § 2401. Finally, Rule 15(c) of the Federal Rules of Civil Procedure which allows a claimant to amend a Complaint to add a party and still have the amendment relate back to the date of the original pleading, is inapplicable here. In the instant case no notice of the pendency of the claim was given to the United

> States within the limitations period of the Federal Tort Claims Act. [Footnotes omitted].

391 F.2d at 262.

If Judge Dee's determination that plaintiff's claim against the University was barred by his failure to comply with the notice of claim requirements of the Utah Governmental Immunity Act is correct, plaintiff's amendment was futile under the cited authorities and Judge Dee acted correctly in denying plaintiff leave to amend.

D. Notice of Claim Defense.

A review of the merits of Judge Dee's ruling on the University's notice of claim defense shows clearly that plaintiff's claim is barred as a matter of law and does not warrant remand to the lower court for further consideration.

Under Utah law, the timely filing of a notice of claim is a condition precedent to maintaining an action against the state or its employee. The Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1 et seq. (1977) provides:

> A claim against the state or its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the Attorney General and the agency concerned within one year after the claim arises. . . .

Utah Code Ann. § 63-30-12 (1977).[4]

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[4] As used in this Act, "the state" includes any hospital, college or university of the state. Utah Code Ann. § 63-30-2(1) (1977).

A claim is deemed to arise for purposes of § 63-30-12, "when the statute of limitations that would apply if the claim were against a private person begins to run." Utah Code Ann. § 63-30-11(1) (1977). Since this is an action for medical malpractice, the applicable statute of limitations is that contained in the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-1 et seq. (1977).

Section 78-14-4 of the Health Care Malpractice Act provides that the limitations period for filing a medical malpractice action commences to run when the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury. The Utah Supreme Court has interpreted this provision to mean that the limitations period begins to run when the plaintiff or patient discovers or should have discovered that he has sustained an injury and that the injury may have been possibly caused by the negligence of the health care provider. Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979).

In this case plaintiff admits that he was aware of the facts giving rise to his claim against Dr. Stevens "soon after January 27, 1982." Addendum, pp. 5-6. Since plaintiff's claim against the University of Utah Medical Center is based solely on its status as Dr. Stevens' employer, plaintiff discovered his "legal injury" against the University at that same time. He then had one year, or until approximately January 27, 1983,

to file the appropriate notice of claim with the Attorney General's Office and the University of Utah Hospital. Plaintiff did not comply with the notice of claim requirement, however, until August 1984, more than one and a half years too late. His claim as to the University of Utah Medical Center and Hospital is therefore barred as a matter of law, as the lower court properly found. Yates v. Vernal Family Health Center, 617 P.2d 352, 354 (Utah 1980).

Contrary to plaintiff's argument, the running of the statute of limitations upon his claim against the University of Utah does not turn upon when he "discovered" the employment relationship between the University and Dr. Stevens. The "discovery of legal injury" concept adopted in Foil v. Ballinger, supra, does not impact on issues of agency and employment. Foil does not hold that a legal injury is discovered only when a patient knows the identity of all persons or entities involved in his care and the relationship between those persons or entities. Indeed, such a holding would not be consistent with the Court's reasoning. The Foil court adopted the "legal injury" concept because of the unique nature of medical malpractice cases and the great disparity in knowledge of medical procedures between patients and doctors. That same uniqueness and disparity of knowledge do not exist in matters respecting

identification of parties and agency relationships. Information about a prospective defendant's employment is as easily obtainable by an injured automobile driver. Foil therefore does not excuse plaintiff's failure to file a timely notice of claim.

None of plaintiff's authorities are to the contrary. None of the cased cited by plaintiff deal with principles of agency. None of them suggest that the running of the statute of limitations as to an employer should await the discovery by the plaintiff of the fact of the defendant's employment.

CONCLUSION

For the foregoing reasons, respondent respectfully asks that the judgment of the lower court dismissing plaintiff's Complaint and action be affirmed.

DATED this 7th day of October, 1985.

SNOW, CHRISTENSEN & MARTINEAU

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Merlin R. Lybbert
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Attorneys for Respondent

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ADDENDUM

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,

STATE OF UTAH

- - - - - - -

RONALD CUNNINGHAM,

Plaintiff,

vs.

MICHAEL H. STEVENS, M.D.,

Defendant.

AFFIDAVIT OF MICHAEL H. STEVENS, M.D.

Civil No. C84-286

- - - - - - - -

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

MICHAEL H. STEVENS, Upon being first duly sworn, deposes and says:

1. That he is the defendant named in the above-entitled action.

2. That at all times mentioned in plaintiff's Complaint he was an employee of the University of Utah School of Medicine, with the rank of Associate Professor of Surgery.

3. That at all times mentioned in plaintiff's Complaint the treatment and care rendered to plaintiff was done in his capacity as an employee of the University of Utah and during the performance of his duties and within the scope of his em-

ployment, as aforesaid.

s/
Michael H. Stevens, M.D.

SUBSCRIBED AND SWORN to before me this 2 day of February 1984.

(Seal)

s/ Florence B Taylor
Notary Public
Residing at SLC Utah.

MERLIN R. LYBBERT
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Attorneys for Defendant
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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,

STATE OF UTAH

- - - - - - -

RONALD CUNNINGHAM,

Plaintiff,

vs.

MICHAEL H. STEVENS, M.D.,

Defendant.

AFFIDAVIT OF G. RICHARD LEE, M.D.

Civil No. C84-286

- - - - - - -

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

G. RICHARD LEE, M.D., upon being first duly sworn, deposes and says:

1. That since the 1st day of March, 1978, he has been the Dean of the University of Utah School of Medicine, with the rank of Professor, and as such is familiar with the status and terms of employment of physicians at the University.

2. Beginning prior to the 29th day of December, 1981, Michael H. Stevens, M.D., was employed as an Associate Professor of Surgery in the School of Medicine by the University of Utah.

3. That in connection with the services of Dr. Michael H. Stevens at the University of Utah, whether rendered in his capacity

as a teacher of medical principles and procedures or in connection with the care and treatment of patients, such activities are carried out as a part of his duties as an employee of the University of Utah School of Medicine and within the scope of his employment.

4. That his treatment and care of Ronald Cunningham commencing on or about December 29, 1981, were undertaken and rendered in his capacity as an employee of the University of Utah Hospital and within the scope of that employment.

S/
G. Richard Lee, M.D.

SUBSCRIBED AND SWORN to before me this 3rd day of February, 1984.

S/ Gayle D Pace
Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:
12-1-85

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ATTORNEYS FOR PLAINTIFF

IN THE THIRD JUDICIAL DISTRICT COURT OF

SALT LAKE COUNTY, STATE OF UTAH

RONALD CUNNINGHAM, Plaintiff, vs. MICHAEL H. STEVENS, M.D., Defendant.	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND COMPLAINT Civil No. C84-286 (Judge David B. Dee)

Plaintiff respectfully submits the following Memorandum of Points and Authorities in Support of its Motion to Amend Complaint

Rule 15 of the Utah Rules of Civil Procedure provides:

> (a) A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

provides that a claim against the State is deemed to arise when the Statute of Limitations would otherwise commence against a private person. Section 63-30-14 states that a Notice of Claim must be filed within one year after the claim arises.

Plaintiff suffered severe physical injury on the 27th day of January, 1982. Beginning soon after that date, Plaintiff was informed and aware of facts giving rise to his claim against Dr. Stevens. However, despite reasonable diligence exerted, Plaintiff was not informed of his legal injury as caused by the University of Utah Medical Center until the 7th day of February, 1984. This lack of knowledge was at least partially caused by Dr. Stevens' failure to inform Plaintiff of his agency and employment relationship. In any event, Plaintiff did not through reasonable diligence discover his "legal injury" until more than two years after the actual misconduct.

In Foil v. Ballinger, 601 P.2d 144, 147 Utah (1979), the Utah State Supreme Court declared that the Statute of Limitations commences on a medical malpractice claim only upon the discovery of the "legal injury." The Utah Court cited and agreed with the Oregon Supreme Court in Berry v. Branner, 421 P.2d 996, 998 Or. (1966):

> To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one.

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May 26, 1983

DATE SERVED 6/9/1983
AT RESIDENCE 485
UPON MICHELLE - DAUGHTER
SINDT Constable Murray Precinct
Salt Lake County, State of Utah
Deputy

Dr. Michael Stevens
c/o University Hospital
50 Medical Drive
Salt Lake City, Utah 84132

3496 Mill Hollow Circle
Salt Lake City, Utah

Dear Dr. Stevens:

I have been retained to represent Mr. Ronald Cunningham and his family in regard to surgery that you performed upon Mr. Cunningham on or about the 27th day of January, 1982. The surgery had been represented to Mr. Cunningham and his family as being a minor procedure and developed into a very serious procedure, beyond your capacity to handle in your specialty, even though you proceeded to attempt to remedy the situation which, my client feels, was negligent on your part and, as you know, the results were disastrous.

The surgery took place in the University Hospital under your direction and was conducted without Mr. Cunningham and his family having given an informed consent as neither Mr. Cunningham nor his family nor, we allege, you knew of the magnitude of the tumor prior to the commencement of the surgery, which lack of knowledge on your part led to the procedures about which he and his family are complaining.

This letter is being sent to you in order to meet the requirements of Section 78-14-8 of the Utah Code Annotated, 1953 As Amended.

Very truly yours,

Joseph S. Knowlton

JOSEPH S. KNOWLTON
Attorney at Law
845 East 400 South
Salt Lake City, Utah 84102

T. RICHARD DAVIS
MARSDEN, ORTON & LILJENQUIST
68 South Main, Fifth Floor
Salt Lake City, Utah 84101

ATTORNEYS FOR PLAINTIFF

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

RONALD CUNNINGHAM,	:	
Plaintiff,	:	PLAINTIFF'S MOTION TO AMEND COMPLAINT
vs.	:	
MICHAEL H. STEVENS, M.D.,	:	Civil No. C84-286 (Judge David B. Dee)
Defendant.	:	

COMES NOW Plaintiff, through counsel, and pursuant to Rule 15(a) of the Utah Rules of Civil Procedure, respectfully moves the Court for an Order allowing Plaintiff to Amend his Complaint adding the University of Utah Medical Center as a party Defendant and asserting causes of action against said Defendant as set forth in Plaintiff's proposed Second Amended Complaint attached hereto as Exhibit "A".

This Motion is supported by the Affidavits of Ronald Cunningham and Joan Cunningham dated March 28, 1984, and the

Affidavits of Michael H. Stevens, M.D. and G. Richard Lee, M.D., dated February 2 and 3, 1984, respectively, all on file herein. It is further supported by a Memorandum of Points and Authorities filed together herewith.

DATED this 15th day of November, 1984.

JOSEPH S. KNOWLTON

T. RICHARD DAVIS
MARSDEN, ORTON & LILJENQUIST

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing PLAINTIFF'S MOTION TO AMEND COMPLAINT to Merlin R. Lybbert, Snow, Christensen & Martineau, Attorneys for Defendant, Michael H. Stevens, M.D., 10 Exchange Place, 11th Floor, P. O. Box 3000, Salt Lake City, Utah 84110, and State of Utah, Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid, on the 15th day of November, 1984.

EXHIBIT "A"

JOSEPH S. KNOWLTON
Attorney at Law
845 East 400 South
Salt Lake City, Utah 84102

T. RICHARD DAVIS
MARSDEN, ORTON & LILJENQUIST
68 South Main, Fifth Floor
Salt Lake City, Utah 84101

ATTORNEYS FOR PLAINTIFF

IN THE THIRD JUDICIAL DISTRICT COURT OF

SALT LAKE COUNTY, STATE OF UTAH

RONALD CUNNINGHAM, Plaintiff, vs. MICHAEL H. STEVENS, M.D., and UNIVERSITY OF UTAH MEDICAL CENTER, Defendants.	PROPOSED SECOND AMENDED COMPLAINT Civil No. C84-286 (Judge David B. Dee)

Plaintiff complains of Defendants and alleges:

PARTIES

1. Plaintiff Ronald Cunningham was a patient at University Hospital in Salt Lake City, Utah, under the care and control of Defendants Michael H. Stevens and University of Utah Medical Center, beginning January 27, 1982, when he suffered serious

injuries by the wrongful acts and conduct of said Defendants as hereinafter set forth.

2. Defendant, Michael H. Stevens, M.D. is, and at all times material hereto was, a physician licensed to practice and practicing medicine in the State of Utah as a health care provider as defined in Section 78-14-3, Utah Code Annotated, 1953, as amended.

3. On the 9th day of June, 1983, a Notice of Intent to Commence Legal Action in letter form was served on Defendant Stevens pursuant to the provisions of Section 78-14-8, Utah Code Annotated, 1953, as amended. Said Notice was amended and supplemented by letters dated August 1, 1983 and December 28, 1983, both of which were duly served upon said Defendant.

4. Plaintiff has received no response from said Defendant to said Notices.

5. Defendant, University of Utah Medical Center is, and at all times material hereto was, a licensed health care provider as defined in Section 78-14-3, Utah Code Annotated, 1953, as amended and the employer of Defendant, Michael H. Stevens, M.D.

6. On or about the 5th day of February, Plaintiff first received notice of Defendants employment and agent relationship with Defendant Medical Center through an Affidavit filed in support of a Motion to Dismiss.

7. On the 7th day of March, 1984, a Notice of Intent to Commence Legal Action was served upon the Attorney General for the State of Utah and on the 30th day of July, 1984, a similar

Notice was served upon the Defendant Medical Center pursuant to Section 78-14-8, Utah Code Annotated, 1953, as amended.

8. Plaintiff has received no response from said Defendant to said Notice.

COUNT I

(Negligence)

9. Beginning the 29th day of December, 1981, Defendants undertook to provide and maintain surgical and medical care and treatment for Plaintiff.

10. Beginning the 29th day of December, 1981, while the Plaintiff was a patient at the University Hospital under the treatment and care of Defendants, Defendant Medical Center, through its agent and employee Defendant Stevens, wrongfully, negligently and carelessly failed to provide and maintain proper and adequate medical and surgical diagnosis, treatment, services and care for him.

11. At the time of the wrongful, negligent and careless act and omissions of the Defendant Medical Center through its agent and employee Defendant Stevens, the care, treatment and services provided to Plaintiff, including the instrumentalities employed therein, were under the exclusive supervision, control and management of said Defendant. Furthermore, Plaintiff did not contribute to his injury, the occurrence of which was more

probably than not the proximate result of the negligence of said Defendant, its agent and employee, Defendant Stevens.

12. As a proximate result of the negligent acts and omissions of the Defendant, Medical Center through its agent and employee Defendant Stevens, following the surgery first performed by Defendant Stevens on the 28th day of January, 1982, Plaintiff was rendered temporarily comatose, suffered permanent loss of most of his basic voluntary physical functions, and sustained mental and emotional injury from all of which he has suffered severe and excruciating pain, discomfort and disability, and from which he will continue to suffer pain, discomfort, and permanent disability all to his general damage in a reasonable sum.

13. As a further consequence to the negligent acts and omissions of Defendant Medical Center through its agent and employee Defendant Stevens, Plaintiff's initial hospitalization was greatly prolonged, and he has been required to seek additional medical treatment, has been required to employ the services of doctors, nurses, therapists and other medical personnel for medical care and treatment, and has incurred hospital, doctor, and other medical expenses in the approximate amount of $100,000.00, and will be required in the future to incur expenses for medical care and treatment all to his special damage.

14. At the time of his injuries, Plaintiff was 54 years of age, in good physical condition and was gainfully employed in

producing economic benefits which he contributed to the support of his family; he was in good health, intelligent, and a source of joy, companionship, happiness, support, and care of his family.

15. As a further consequence to the negligent acts and omissions of Defendant Medical Center through its agent and employee Defendant Stevens, Plaintiff has suffered a complete loss of earning capacity and ability to provide sustenance and support for his family together with an extreme degree of impairment of his ability to enjoy the society and companionship of his family.

16. The pain, discomfort, and permanent disability which Plaintiff has sustained would not have resulted or occurred if Defendant Medical Center through its agent and employee Defendant Stevens, had not been negligent in the care, treatment and services administered to him, as aforesaid.

17. Plaintiff did not discover and could not, through the use of reasonable diligence have discovered his legal injury caused by Defendant Medical Center until after the 5th day of February, 1984, the day Plaintiff was first given notice of Defendant Stevens' employment and agency with Defendant Medical Center.

WHEREFORE, Plaintiff demands judgment as hereinafter set forth.

COUNT II

(Lack Of Informed Consent)

18. Plaintiff adopts, and by this reference, incorporates

herein, the allegations set forth in Paragraphs numbered 5 through 17 of Count I hereof.

19. On or about the 28th day of January, 1982, and thereafter, Defendant Medical Center through its agent and employee Defendant Stevens, subjected, or caused Plaintiff to be subjected, to certain procedures and other medical care and treatment.

20. Prio rto and at the time of said procedures, medical care and treatment, Defendants failed to inform Plaintiff of the potential hazards or dangers incident thereto.

21. Plaintiff did not give his informed consent to the particular procedures recommended and would not have consented had the dangers and hazards thereof been made known to him.

22. As a direct and proximate result of the unauthorized procedures, care and treatment by Defendant Medical Center through its agent and employee Defendant Stevens, Plaintiff was rendered temporarily comatose, suffered permanent loss of most of his basic voluntary physical functions, and sustained mental and emotional injury from all of which he has suffered severe and excruciating pain, discomfort and disability, and from which he will continue to suffer pain, discomfort, and permanent disability all to his general damage in a reasonable sum.

23. As a further direct consequence of the unauthorized procedures, care, and treatment by Defendant Medical Center through its agent and employee, Defendant Stevens, Plaintiff's

initial hospitalization was greatly prolonged, and he has been required to seek additional medical treatment, has been requested to employ the services of doctors, nurses, therapists and other medical personnel for medical care and treatment, and has incurred hospital, doctor, and other medical expenses in the approximate amount of $100,000.00 and will be required in the future to incur expenses for medical care and treatment all to his special damage.

24. At the time of his injuries, Plaintiff was 54 years of age, in good physical condition and was gainfully employed in producing economic benefits which he contributed to the support of his family; he was in good health, intelligent and a source of joy, companionship, happiness, support, and care for his family.

25. As a further direct consequence of the unauthorized procedures, care and treatment by Defendant Medical Center through its agent and employee Defendant Stevens, Plaintiff has suffered a complete loss of earning capacity and ability to provide sustenance and support for his family together with an extreme degree of impairment of his ability to enjoy the society and companionship of his family.

26. The pain, discomfort, and permanent disability which Plaintiff has sustained would not have resulted or occurred if Defendants had not been negligent in the care, treatment and services administered to him, as aforesaid.

27. Plaintiff did not discover and could not, through the

use of reasonable diligence have discovered his legal injury caused by Defendant Medical Center until after the 5th day of February, 1984, the day Plaintiff was first given notice of Defendant Stevens' employment and agency with Defendant Medical Center.

WHEREFORE, Plaintiff demands judgment as hereinafter set forth.

COUNT III

(Gross Negligence)

28. Plaintiff adopts, and by this reference, incorporates herein, the allegations set forth in Paragraphs numbered 5 through 27 of Counts I and II hereof.

29. Beginning the 29th day of December, 1981, Defendant Stevens undertook to provide and maintain surgical and medical care and treatment for Plaintiff.

30. Beginning the 29th day of December, 1981, while the Plaintiff was a patient at the University Hospital under the treatment and care of Defendant Stevens, said Defendant wrongfully and carelessly failed to provide and maintain proper and adequate medical and surgical diagnosis, treatment, services and care for him, which failure was grossly negligent in the circumstances.

31. At the time of the wrongful, grossly negligent and careless acts and omissions of Defendant Stevens, the care,

treatment and services provided to Plaintiff, including the instrumentalities employed therein, were under the exclusive supervision, control and management of said Defendant. Furthermore, Plaintiff did not contribute to his injury, the occurrence of which was more probably than not the proximate result of the gross negligence of Defendant Stevens.

32. As a proximate result of the grossly negligent acts and omissions of Defendant Stevens, following the surgery first performed by said Defendant on the 28th day of January, 1982, Plaintiff was rendered temporarily comatose, suffered permanent loss of most of his basic voluntary physical functions, and sustained mental and emotional injury from all of which he has suffered severe and excruciating pain, discomfort and disability, and from which he will continue to suffer pain, discomfort, and permanent disability all to his general damage in a reasonable sum.

33. As a further consequence to the grossly negligent acts and omissions of Defendant Stevens, Plaintiff's initial hospitalization was greatly prolonged, and he has been required to employ the services of doctors, nurses, therapists and other medical personnel for medical care and treatment, and has incurred hospital, doctor, and other medical expenses in the approximate amount of $100,000.00, and will be required in the future to incur expenses for medical care and treatment all to his special damage.

34. At the time of his injuries, Plaintiff was 54 years og age, in good physical condition and was gainfully employed in producing economic benefits which he contributed to the support of his family; he was in good health, intelligent, and a source of joy, companionship, happiness, support, and care of his family.

35. As a further consequence to the grossly negligent acts and omissions of Defendant Stevens, Plaintiff has suffered a complete loss of earning capacity and ability to provide sustenanc and support for his family together with an extreme degree of impairment of his ability to enjoy the society and companionship of his family.

36. The pain, discomfort, and permanent disability which Plaintiff has sustained would not have resulted or occurred if Defendant Stevens had not been grossly negligent in the care, treatment and services administered to him, as aforesaid.

37. Plaintiff did not discover and could not, through the use of reasonable diligence have discovered his legal injury caus by Defendant Stevens until after the 28th day of January, 1982, the day of the first surgery performed on him by said Defendant.

WHEREFORE, Plaintiff demands judgment against the Defendants jointly and severally, as hereinafter set forth:

1. For a reasonable sum for general damages;

2. For the sum of $100,000.00 special damages for medical expenses incurred, together with such other and further sums of

medical-related expenses as Plaintiff may incur by the time of trial and shall reasonably incur thereafter;

3. For a reasonable sum for lost earnings to date of trial and for loss of earning capacity incurred by Plaintiff; and

4. For Plaintiff's costs incurred herein and for such other and further relief as to the Court may seem just and equitable in the premises.

DATED this _____ day of _____, 1984.

_____
JOSEPH S. KNOWLTON

_____
T. RICHARD DAVIS
MARSDEN, ORTON & LILJENQUIST

ATTORNEYS FOR PLAINTIFF

Plaintiff's Address:

Salt Lake City, Utah

MERLIN R. LYBBERT - A2029
DAVID G. WILLIAMS - A3481
BRUCE H. JENSEN - A1667
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
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P.O. Box 3000
Salt Lake City, Utah 84110
Telephone: 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

- - - - - - - - - - - - - - - - -

RONALD CUNNINGHAM,

Plaintiff,

vs.

MICHAEL H. STEVENS, M.D.,

Defendant.

ORDER

Civil No. C-84-286

Judge David B. Dee

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Plaintiff's Motion for Leave to Amend his Complaint and join the University of Utah Medical Center as a party defendant having come on regularly for hearing before the Court on December 14, 1984, at 10:00 a.m., and plaintiff and defendant having been represented at said hearing by counsel and the University of Utah Medical Center having appeared specially through counsel, and the Court having heard arguments from counsel, and having reviewed memoranda submitted by the parties, and having found and concluded that the claims alleged by plaintiff against the University of Utah Medical Center as set forth in plaintiff's

proposed Second Amended Complaint, attached as Exhibit "A" to plaintiff's Motion to Amended Complaint, are barred by the Notice of Claim provisions of the Utah Governmental Immunity Act,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff's Motion to Amend Complaint to join the University of Utah Medical Center as a party defendant is hereby denied.

DATED this 6 day of Jan, 1985.

BY THE COURT:

David B. Dee
District Judge

J. Brad Wells

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing Brief of Respondent to the following on the 7th day of October, 1985.

T. Richard Davis
MARSDEN, ORTON & LILJENQUIST
68 South Main Street, Fifth Floor
Salt Lake City, Utah 84101

Joseph S. Knowlton
845 East 400 South
Salt Lake City, Utah 84102

Attorneys for Plaintiff/Appellant